

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF APC&EC)	
REGULATION 6: REGULATIONS FOR)	DOCKET NO. 24-003-R
STATE ADMINISTRATION OF THE)	
NATIONAL POLLUTANT DISCHARGE)	
ELIMINATION SYSTEM (NPDES))	

RESPONSIVE SUMMARY

Comes now, the Department of Energy and Environment, Division of Environmental Quality (“Division”), by and through its attorney, Basil V. Hicks III, and provides this Responsive Summary as required under Arkansas Pollution Control and Ecology Commission (“APC&EC”) Rule 8.812.

I. INTRODUCTION

The public comment period for the proposed changes to APC&EC Regulation 6 began on August 3, 2024. The public hearing to receive comments on the proposed changes to APC&EC Regulation 6 occurred on August 26, 2024. During the public hearing, the Hearing Officer extended the public comment period to September 16, 2024.

The Division received 203 comments on the record for Docket No. 24-003-R pertaining to changes to APC&EC Regulation 6, Regulation for State Administration of the National Pollutant Discharge Elimination System (NPDES).

II. RESPONSES TO WRITTEN AND VERBAL COMMENTS

The following people or organizations submitted comments during the public comment period and public hearing.

Fay Knox; Brad Barnes; Daryl Boles; Caroline Rogers; Lowell Collins; Todd P. Dannenfelser; Katie Deakins; Dennis Larson; Derek Linn; Daniel Estes; Doug George; Jerri A. Holmes; Nan Johnson and Dave Spencer; Kevin Otterman; Patrick Lanford; littlehoss1958; Terry Martin; Ginny

Masullo; Victoria McClendon; James and Teresa McMains; Frank Meeks; Ann Mesrobian; Barbara Metzger; Ellen Mitchell; Joseph Morgan; Lisa Orton; Richard P. Osborne; Susan Parker; Scott Parson; Keith Peeples; Rex Porter; Rachel Henriques; John Ray; Roger Reep; Steve Miller; Roxanne Thompson; Gordon Watkins for Buffalo River Watershed Alliance; Cassie Wells; Linda Armerbingham; Evan Teague for Arkansas Farm Bureau Federation; Tommy Young; Tracy Lester (2); Tyler Robinson; Virginia Milan; Whitney Stoker; Wightman Harris; Susan Williams; Stephen Boyd; Steve Eddington; Steve Hignight, Sue Billiot; Susan Watkins; Tammi Dickson; Tammy Knowles; Tammy Smith; Tammy Thompson; Tanner Riggin; Terry Laster; Thomas Freeze; Todd Smith; Tommy Thompson; Donna Bemis; James Patton; Grant Pace; Gordon Greene; George E Tidwell; Gene Pharr; Fredese Wheetley; Ernie Coppock; Eric Mohike; Drew Lee; Ginny Poe; H.C. Chadbourn; Gary Speed; Ellen Corley; Lori Menichetti; Laura Villegas; Kristen Giffin; Helen Schlegel; Ginny Masullo; Chuck Davis; Cheryl Phipps; Carey Autrey; Caleb Plyler; Bruce Ferguson; Brian Roper; Brian Harris; Brett Mason; Brandon Martin; Bobby Cofer; Bill Shannon; Bill Sewell; Amelia Hoyt; Austin Lester; Frank W. Head Jr.; Whitney Stoker; Donna Bemis; Drew Lee; Tana Henson; Mandy Lester; Lauren Hawkins; Jennifer Heaney; James Meeks; James Harvey; Amy Young; Melanie Fosko; Matt Howton; Matt Jackson; Matt Shekels; Mary Stahl; Kathy Wallace; Kayla Pratt; Leslie Turner; Lisa Smith; Magen Allen; Marion Fletcher; Jennifer Sansom; Jeff Worlow; Jeff Felts; Jason Chaffin; Julie Campbell; Joe Thrash; Jasper Fant; Kathleen Marleneanu; Joy Holmes; Jonathan Holder; JM Binns; Jim Dudley; James Binns; Marti Olesen; Marlene Simmons; Darryl Sullivan; Danny Naegle; Daniel Free; Dan Wright; Donald Campbell; Don Hubbell; Denae Daniels; Delbert Walker; Deana Taylor; David Hoyt; David Arthur; Carroll Heustess; Caroline Lester; Carey Robertson; Clifton Gifford; Bruce Jackson; Clayton Davis; CJ Parker; Chris Schaefer; Chris Acre; Chris Heiser; Catrinia Rojas; Cathy Ross; Christina Day; Christy Lavelly; Allyson Peterson; Brian Roper; Brett Mason; Amanda Allen; Amber Dedman; Amelia Hoyt; Amy Young; Austin Lester; Ben Gander; Kathy Downs; Anita Orr; Ann Harris; Aurora Zisner; Beth Ardapple; Tim Neidecker; Stan Garner; Rubin Barnes; Rocky Harrell; Mike Pennington; Michael Richardson; Michael Fisher; Melissa Moore; Matt King; Luke Alston; John Sink; John McMinn; Joe Pattie; Lucas Whittenton; Larry Garlington; Karen Wood; Jake Cartwright; Jackie McMinn; Debbie Alexy; Colin Lockeby; Clay Parker; Brad Peacock; Dane Schumacher; Gordon Watkins

Commenter Fay Knox

Comment: Comments regarding Regulation 5 of the Arkansas Pollution Control and Ecology Commission “Liquid Animal Waste Management Systems.”

Response: APC&EC Regulation 5, “Liquid Animal Waste Management Systems,” is outside the scope of this rulemaking. The authority over permits issued under APC&EC Regulation 5 was transferred to the Department of Agriculture.

Commenters Brad Barnes, Dennis Larson, Derek Linn, Daniel Estes, Doug George, Kevin Otterman, Ginny Masullo, Victoria McClendon, Ann Mesrobian, Ellen Mitchell, Joseph Morgan, Lisa Orton, Susan Parker, Scott Parson, Rex Porter, Rachel Henriques, Steve Miller, Roxanne Thompson, Virginia Milan, Whitney Stoker, Wightman Harris, Susan Williams, Susan Watkins, Tammy Knowles, Tammy Smith, Drew Lee, Ginny Poe, Ellen Corley, Lori Menichetti, Laura Villegas, Kristen Giffin, Helen Schlegel, Frank W. Head Jr., Whitney Stoker, Drew Lee, Mary Stahl, Jasper Fant, Kathleen Marleneanu, Joy Holmes, Jonathan Holder, JM Binns, Jim Dudley, James Binns, Marti Olesen, Marlene Simmons, Donald Campbell, Denae Daniels, Clayton Davis, Cathy Ross, Christina Day, Christy Lavelly, Allyson Peterson, Amber Dedman, Anita Orr, Ann Harris, Aurora Zisner, Debby Alexy, Ginny Masullo

Comment: General support of the comments of the Buffalo River Watershed Alliance.

Response: The Division acknowledges these comments. See response to Buffalo River Watershed Alliance below.

Commenter Daryl Boles

Comment: We need food, but at what expense to the environment? CAFOs in watershed areas should be off limits, for all environmental means! Please be proactive not reactive with our natural resources.

Response: Any CAFO situated within the State of Arkansas would be in a “watershed area” in the same way that any parcel of land in Arkansas is within a watershed. As proposed, APC&EC Rule 6 maintains the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Commenters Caroline Rogers, Lowell Collins, John Ray, Cassie Wells, Jerri A. Holmes, Nan Johnson and Dave Spencer, Patrick Lanford, David Arthur, littlehoss1958, Ginny Masullo, Victoria McClendon, Katie Deakins, James and Teresa McMains, Frank Meeks, Ann Mesrobian, Barbara Metzger, Richard P. Osborne, Keith Peeples, Roger Reep, H.C. Chadbourn, Gary Speed, Lauren Hawkins, Marti Olesen, Jennifer Heaney, Todd P. Dannenfelser

Comment: Comments supporting the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed

Response: APC&EC Rule 6 maintains the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The Division recognizes the differences of

opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Commenters Lowell Collins, John Ray, Cassie Wells, Patrick Lanford, David Arthur, Ginny Masullo, Victoria McClendon, Katie Deakins, James and Teresa McMains, Keith Peeples, Rex Porter, Susan Watkins, H.C. Chadbourn, Jennifer Heaney, Todd P. Dannenfelser

Comment: Please void the four non-operational permits currently located in the BRW, so they cannot be reactivated in the future. Preserve and protect Arkansas extraordinary rivers and streams.

Response: Permits issued under APC&EC Regulation 5, “Liquid Animal Waste Management Systems,” are outside the scope of this rulemaking. The authority over permits issued under APC&EC Regulation 5 was transferred to the Department of Agriculture.

Commenters Kevin Otterman, Todd P. Dannenfelser

Comment: We should take great pride in our “natural state” and in doing so do everything in our power to protect it for future generations. While the Buffalo is an area of critical concern, it is my sincere hope that we will take greater care of our watersheds, such as the White River, Kings, Mulberry, Eleven Point, Crooked Creek, War Eagle and many others than we have in recent years. While one part of our state and economic development is chasing every growing tourism dollars, it seems we have competing interests that are taking a very damaging toll on those same resources, destroying water quality. We have to do better.

Response: The Division acknowledges the comment. APC&EC Rule 2 establishes water quality standards for waters in the State of Arkansas and is outside the scope of this rulemaking.

Commenter Terry Martin

Comment: I support the Buffalo River, not the farmers.

Response: The Division acknowledges the comment.

Commenter Ginny Masullo

Comment: Some folks are saying they use this email address and get an invalid address message.

Response: The Division acknowledges the comment. The Division verified that it was receiving emails via the email address provided in the public notice.

Commenters Gordon Watkins for Buffalo River Watershed Alliance, Kathy Downs, Beth Ardapple

Comment: Of interest to BRWA and our supporters are the changes to Chapter 6, “Specific Watershed Requirements” which establishes a permanent moratorium, stating in part, “The Director shall not issue a permit pursuant to this rule for a new swine CAFO in the Buffalo National River Watershed” We fully support this language. The Buffalo National River only comprises 11% of the watershed which feeds it. Quality of the river for recreational purposes, including primary contact, is dependent on the quality of the water in its tributaries. Due to the karst nature of the watershed, the river is particularly vulnerable to pollutants, such as liquid animal waste, which can penetrate the porous surface and emerge in springs which feed the river. Dye trace studies have verified this risk. Because of the importance of the Buffalo River to the economy of Arkansas, and particularly to those communities within its watershed, it behooves the state to take appropriate steps such as this to preserve and protect this state icon for future generations to enjoy.

Response: APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Comment: However, 6.602(C) says, “This rule does not prohibit the Director from issuing a new Rule 6 permit for a facility that holds an active Liquid Animal Waste Management Systems permit as of the effective date of this rule.” The section does allow for the issuance of new Reg 6 permits to holders of existing Reg 5 permits in the watershed but does not allow for any increase in the number of animals. Because this rule making makes direct reference to “Liquid Animal Waste Management Systems” (ie: Reg 5 permits), the following comments regarding Reg 5 permits are within the scope of this rule making and therefore require a response. BRWA has identified four facilities in the Buffalo River watershed with “Active” Reg 5 permits, although none are currently operational most have been effectively closed for several years, are in violation of regulations, and should be voided. They include the following permits: 4067-W in Marshall, AR, issued in 1991 for 60 dairy cows. A 2013 inspection report stated it was “not in operation” and recommended a closure plan be prepared. DEQ requested annual reports or a closure plan in 2010 but none have been submitted since 2009. 3121-WR-4, Deer, AR issued in 1998 for 400 sows. Inspection reports in 2007, 2008, 2011 and 2012 all indicated “no animals are present, ponds are essentially empty.” In 2018 DEQ requested annual

reports or a closure plan. No annual reports are posted for this permit since its issuance. 3823-WR-5, Lurton, AR issued in 2003 for 425 sows. Inspection report in 2017 stated “not operating for some time”. In 2017 DEQ issued an enforcement report indicating the facility “has not been in operation for some time” and requesting a closure plan of annual reports. In 2018 DEQ again requested annual reports or a closure plan. Neither have been posted since the permit was issued. 3540-WR-7, Vendor, AR issued in 2012 for “land application of swine waste from C&H Farms only”. C&H ceased operations in 2019. No annual reports or closure plan have been posted since 2019. Although these four facilities have not completed the required closure procedures, none have any animals and none have submitted annual reports since 2019 or earlier which places these facilities in violation of the law and these permits should be immediately voided. Further, we would like clarification from DEQ as to whether any of these permits, if they are not voided, could be reactivated to either 1) restock animals and resume previous operations, or 2) accept waste from other facilities for field application, including industrial waste. If these facilities could be reactivated, or they can accept transferred waste, we do not support this language. While BRWA generally supports this rulemaking we would like clarification regarding section 6.502(c) referencing existing Reg 5 permits in the watershed.

Response: Permits issued under APC&EC Regulation 5, “Liquid Animal Waste Management Systems,” are outside the scope of this rulemaking. The authority to act on permits issued under APC&EC Regulation 5 was transferred to the Department of Agriculture. An existing permit must be in good standing at the time of that transfer. The Division notes that APC&EC Regulation 5 does not authorize any land application of industrial waste and is limited to liquid animal waste management systems.

Comment: In response to the previous commentor, APC&EC Rule 6 does not apply to small farms, only to CAFOs medium and large CAFOs, as defined in the federal rules.

Response: The Division acknowledges the comment. APC&EC Rule 6 requires a person to obtain permit coverage for the discharge of a pollutant or pollutants from a point source into a water of the state.

Commenter Linda Armerbingham

Comment: Leave the Buffalo River alone.

Response: The Division acknowledges the comment.

Commenter Evan Teague for Arkansas Farm Bureau Federation

Comment: Our comments will be focused on Chapter 6, specifically Rule 6.602—Buffalo River Watershed. While we understand and appreciate the need for sensible and

pragmatic regulations to protect the environment, we do not believe that is what this rulemaking represents. Banning an agricultural activity, hog farming in this instance, from a watershed implies that activity is a significant threat. Previous scientific studies have refuted these assertions, and an ongoing yet to be published USGS study also suggests that agricultural production is not likely the cause of ongoing issues in the Buffalo River. Singling out one economic sector without the supporting science is regulation by the precautionary principle.

The “right to farm” is a foundational principle that supports the continuation of agricultural operations without unreasonable interference. This rule not only affects swine producers but could also have a lasting impact on the broader farming community and future generations of farmers. The proposed moratorium sets a precedent that could potentially lead to further restrictions on various types of farming within the watershed and beyond.

Our continued engagement in this issue is based on insistence from our county Farm Bureau members, especially those involved in animal agriculture who live in the impacted area. These farmers believe these proposed changes not only infringe on their right-to-farm and private property rights, but are potentially contrary to existing state statutes, lack scientific justification, are arbitrary and capricious, and do not comport with the “reasonableness clause.”

Response: APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed, which does include the continuation of ongoing agricultural operations. In its rulemakings, the Pollution Control and Ecology Commission considers scientific data and studies that were readily available or provided. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Comment: Specifically regarding Chapter 6.602, this language was originally included as part of a third-party rulemaking that was initiated in 2014 and finalized in 2015. This language provided an exemption for small farms which has been removed in this proposed draft. All parties involved in the original process understood that Section 6.602(E) of Regulation 6 was intended to serve as a sunset clause by requiring the Department to initiate rulemaking within 5 years to remove Rule 6.602(E) or 6.602 in its entirety. If the Department chose to initiate rulemaking to make the moratorium permanent and the rulemaking failed, the moratorium language (Section 6.602) was to be stricken from the rule. If the department chose to remove the moratorium language and that failed, the moratorium would become permanent. In July 2019 the Commission initiated rulemaking to make the moratorium permanent. During the 2020 legislative review process the Public Health Committee refused to review the rulemaking and the Administrative Rule Committee voted unanimously to disapprove the rulemaking. This moratorium should have ended at that point, but the Department chose to not take action and left the language in the rule. Given this history, the current decision to pursue the same course of action raises significant concerns about the process and the

justification for such a measure. We request the Department and Commission cite which section(s) of the Arkansas code grants the Department and Commission the authority to disregard the unanimous decision of a legislative committee by not removing this language.

We strongly urge the Department and the Commission to strike Section 6.602. As you are aware, this should have been done after the 2020 legislative review process when the ALC – Administrative Rules Committee unanimously voted to disapprove the previous rulemaking attempt. The basis for their disapproval was that a permanent moratorium is not consistent with legislative intent, and, since this disapproval, absolutely nothing has changed in the level of swine based agriculture activity in the region.

Response: APC&EC Regulation 6.602(E) is not written as a “sunset clause.” APC&EC Regulation 6.602(E) states, “Five years from the effective date of this regulation the Director shall initiate rulemaking to either delete this paragraph, Reg. 6.602(E), or delete the entirety of Reg. 6.602.” As written, APC&EC Regulation 6.602(E) required the Director to initiate the rulemaking process within the timeframe, and an approved rulemaking is required to change APC&EC Regulation 6.602.

The 2019 rulemaking to change APC&EC Regulation 6.602 was not reviewed and approved by the legislature, and therefore the language of APC&EC Regulation 6.602 could not be changed by the 2019 rulemaking. Thus, the result of the failed rulemaking maintained the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Comment: Our policy supports the use of sound science to develop legislative and regulatory policies; however, the proposed revisions to Section 6.602 of Rule 6 are not founded in sound science. Scientific studies performed in the Buffalo River watershed, such as those completed by the Big Creek Research and Extension Team (BCRET), United States Geological Survey (USGS), Buffalo River National Park Service (BRNPS), FTN & Associates (FTN), Harbor Environmental (Harbor), Beautiful Buffalo River Action Committee (BBRAC), and the Department itself over the last decade and even scientific studies performed all the way back in the 1970s, do not support a permanent moratorium on permitting swine farms in the Buffalo River watershed. We respectfully request on behalf of our members, especially those who live and work in the counties impacted by these regulatory changes, that you strike the language in Section 6.602.

Long-term monitoring dating back to the mid-1980s shows nitrate concentrations, while still extremely low, have been consistently trending upward. However, over the same time frame the number of animal units associated with production agriculture in the watershed has remained relatively stable and has actually been trending downward since the mid-1990s. Swine numbers peaked in the early-1990s and have precipitously declined since that time. Obviously, something other than agriculture, particularly swine farms, is affecting the perception, albeit unfounded,

that there is an impact on the Buffalo River as its water quality remains extremely high.

Response: APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed, which does include the continuation of ongoing agricultural operations. In its rulemakings, the Pollution Control and Ecology Commission considers scientific data and studies that are readily available or provided . The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

The Division does not concur with Commenter's conclusion regarding the history of swine farms in the Buffalo River Watershed. The potential impacts of swine farms, including farms large enough to be considered CAFOs, on the Buffalo River have been an ongoing concern in Arkansas, and the Division (or its predecessors) have taken action to mitigate the impacts of existing farms in that watershed. In 1992, APC&EC Regulation 5 was adopted to address how liquid waste from swine farms should be handled. Also in 1992, the Arkansas Department of Pollution Control and Ecology (the Division's predecessor) issued an administrative notice regarding its intent not to issue permits in the Buffalo River Watershed. Following the adoption of APC&EC Regulation 5 and that notice, Arkansas participated in the Buffalo River Swine Waste Demonstration Project, which was initiated in 1995, to improve swine manure management in the Buffalo River watershed.

After that work in the 1990s, APC&EC Regulation 6.602 was promulgated through a third-party rulemaking, Pollution Control and Ecology Commission Docket #14-003-R. That 2014 third-party rulemaking describes the real and potential impact medium and large swine CAFOs can have on this Extraordinary Resource Water.

That third-party rulemaking came about as part of the reaction to C&H Hog Farm's 2012 notice of intent for coverage under the Division-issued NPDES general permit for CAFOs and the Division's subsequent approval for that coverage. The litigation about that farm's application for a permit under APC&EC Regulation 5 is outside the scope of this rulemaking.

While the commenter focuses on the trend for nitrogen in the watershed, the Division assesses water quality based on APC&EC Rule 2, which establishes water quality standards for surface waters in the State of Arkansas. For example, the 2018 303(d) List of Impaired Waterbodies resulted in four Assessment Units (two sections of Big Creek and two sections of the Buffalo National River) being identified as impaired—three for bacteria and one for dissolved oxygen.

Comment: Why is the Arkansas Department of Energy & Environment (Department) reinitiating rulemaking after the Arkansas Legislative Council denied the request in 2020? In 2020, the Division sought to make the moratorium permanent, but the Arkansas Legislative Council (ALC) unanimously voted to disapprove the rule. The primary reason was that the Department already has the authority to deny

permits on a case-by-case basis, making a permanent moratorium unnecessary. Furthermore, the ALC noted that the denial of C&H Hog Farms' Regulation 5 permit effectively halted operations in the watershed, raising questions about the need for additional regulations. Since the ALC's disapproval, there has been no increase in swine farming in the area to justify revisiting this measure. Given that legislative approval is required for the rule to become final, why has the Commission not removed Section 6.602 following the ALC's vote?

Why is a moratorium necessary when the Department has authority to deny permits on a case-by-case basis? Arkansas Code §§ 8-4-203 and 8-4-207 require the Department to evaluate permit applications on their individual merits. This ensures that each application is fairly considered, with the opportunity for appeal to the Commission. The proposed moratorium undermines this established process by imposing a blanket restriction, disregarding the unique circumstances of individual applications and violating property owners' rights.

Response: APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed, which does include the continuation of ongoing agricultural operations. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

The example of C&H Hog Farm demonstrates that the Division's authority to deny permits on a case-by-case basis is different for permit coverage under NPDES general permits as compared to individual permits. Permittees meeting the qualifications for coverage under a general permit will receive coverage. Applications for individual permits are evaluated on a case-by-case basis and in compliance with the applicable rules and criteria.

Comment: Why does the moratorium now include small hog farms when the original regulations targeted only medium and large farms? In the current Regulation finalized in 2015, the temporary moratorium applied only to medium and large swine farms. However, with the proposed rule, the Department has now included small farms in the moratorium, going beyond the scope of the original rules. This extension of the moratorium to small farms has been proposed without any scientific or regulatory justification. This further demonstrates the arbitrary nature of these proposed changes, which we believe lack sound reasoning or evidence-based support.

Response: APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed, which does include the continuation of ongoing agricultural operations. APC&EC Rule 6.602 applies to CAFOs, which are defined as medium and large CAFOs. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Comment: Why is Big Creek listed as impaired with an unknown cause, yet has been used to justify the moratorium? Big Creek (middle) is listed on the 303(d) list as impaired, but the cause of impairment is stated as “unknown.” This indicates that the Department lacks sufficient data to conclusively link the impairment to swine farming or any other scientifically sound reason/cause. Additionally, other water bodies on the 303(d) list have not been subject to similar moratoriums?

Response:

APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The 2014 third-party rulemaking in Pollution Control and Ecology Commission Docket #14-003-R that promulgated APC&EC Regulation 6.602 occurred independently of the 2018 303(d) List of Impaired Waterbodies.

Comments concerning the 2018 303(d) List of Impaired Waterbodies are outside the scope of this rulemaking. However, at the time, the Division received comments on the 2018 303(d) List of Impaired Waterbodies. While some comments expressed concerns that the listing of Big Creek resulted from sampling that targeted C&H Hog Farm, The Division stated that the majority of data used for assessment was provided by NPS and USGS. In its 305(b) Report, DEQ identified the potential sources of the impairment for pathogens as manure application (hog and chicken), leaking septic tanks, tourism, and wildlife. The Division then stated that future surveys using Phylo-chip technology are planned for the watershed to help identify the sources. In addition, the Division’s use of “unknown” to categorize the source for this impairment is in line with the Watershed Management Plan that contemplates implementing best management practices (BMPs) only after sources of pathogen, particularly *E. coli*, have been identified.

Comment: Why invoke karst topography as justification when existing regulations address the risks and please explain why the land application of swine manure in fields underlain by karst is considered unacceptable in the Buffalo River watershed, while the application of other forms of nutrients is allowed? The presence of karst terrain has been cited as a rationale for the moratorium. However, the USDA’s Agricultural Waste Management Field Handbook (AWMFH) allows for the siting of farms in karst regions with additional safeguards. Moreover, the Buffalo River National Park Service (BRNPS) permits nutrient applications on fields adjacent to the Buffalo River under nutrient management plans. If karst terrain poses such a significant risk, it seems inconsistent to allow nutrient applications by the BRNPS while prohibiting swine farms farther away from the river.

Response: APC&EC Rule 6 maintains the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River

Watershed. USDA's Agricultural Waste Management Field Handbook (AWMFH) is mentioned in APC&EC Regulation 5, not in APC&EC Rule 6, and is therefore outside of the scope of this rulemaking. APC&EC Rule 6 is applicable to point source discharges, including discharges to surface waters and discharges from CAFOs. Permits for land application of wastes are outside the scope of this rulemaking.

Comment: Why use “unnecessary risk” as justification for an emergency moratorium when the law requires “imminent peril”? The justification for the emergency moratorium does not meet the statutory threshold of “imminent peril,” as required by law. The use of “unnecessary risk” lacks the urgency necessary for emergency rulemaking and raises concerns about the overreach of regulatory authority. We also question whether the original issuance of the temporary 2015 moratorium was correctly applied under emergency provisions. The lack of an actual emergency at that time—and now—suggests that the emergency rulemaking process was, and continues to be, improperly used to justify unnecessary regulatory action. Why invoke emergency authority when no clear emergency exists? The Department has invoked emergency authority without evidence of an immediate crisis to justify bypassing the standard regulatory process. This approach, both in 2015 and now, undermines the legitimacy of the emergency moratorium and calls into question the necessity of such measures.

Response: APC&EC Rule 6 maintains the status quo with respect to with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The Division followed its normal rulemaking process and did not seek an emergency rulemaking. Comments regarding the procedures followed for the 2014 third-party rulemaking are outside the scope of this rulemaking.

Comment: Is EPA requiring the Commission or the Department to implement a moratorium in the Buffalo River watershed? According to rulemaking documents, “The risk of not updating this rule is that the EPA could attempt to remove Arkansas’s delegated authority to issue NPDES permits under the federal Clean Water Act. The loss of delegated authority would result in the EPA becoming the permitting authority for Arkansas.” Although parts of the rule making may be necessary, we do not believe the language in Section 6.202, whether retained or removed, is required as part of the programmatic updates mandated by the EPA.

Response: EPA is not requiring Pollution Control and Ecology Commission or the Division to maintain the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. This rulemaking is necessary to ensure that APC&EC Rule 6 for the regulation of NPDES permits is compliant with federal law. The Division administers over 5000 NPDES permits. None of those active permits are for a CAFO. Arkansas’s loss of its delegated authority to issue NPDES permits

under the federal Clean Water Act would directly impact over 5000 current NPDES permittees.

Commenters Tommy Young, Tracy Lester, Tyler Robinson, Stephen Boyd, Steve Eddington, Steve Hignight, Sue Billiot, Tammi Dickson, Tammy Thompson, Tanner Riggan, Terry Laster, Thomas Freeze, Todd Smith, Tommy Thompson, Donna Bemis, James Patton, Grant Pace, Gordon Greene, George E Tidwell, Gene Pharr, Fredese Wheatley, Ernie Coppock, Eric Mohike, Chuck Davis, Cheryl Phipps, Carey Autrey, Caleb Plyler, Bruce Ferguson, Bruce Ferguson, Brian Roper, Brian Harris, Brett Mason, Brandon Martin, Bobby Cofer, Bill Shannon, Bill Sewell, Amelia Hoyt, Austin Lester, Donna Bemis, Tana Henson, Mandy Lester, James Meeks, James Harvey, Amy Young, Melanie Fosko, Matt Howton, Matt Jackson, Matt Shekels, Kathy Wallace, Kayla Pratt, Leslie Turner, Lisa Smith, Magen Allen, Marion Fletcher, Jennifer Sansom, Jeff Worlow, Jeff Felts, Jason Chaffin, Julie Campbell, Joe Thrash, Darryl Sullivan, Danny Naegle, Daniel Free, Dan Wright, Don Hubbell, Delbert Walker, Deana Taylor, David Hoyt, Carroll Heustess, Caroline Lester, Bruce Jackson, Carey Robertson, Clifton Gifford, CJ Parker, Chris Schaefers, Chris Acre, Chris Heiser, Catrinia Rojas, Brian Roper, Brett Mason, Amanda Allen, Amelia Hoyt, Amy Young, Austin Lester, Ben Gander, Tim Neidecker, Stan Garner, Rubin Barnes, Rocky Harrell, Mike Pennington, Michael Richardson, Michael Fisher, Melissa Moore, Matt King, Luke Alston, John Sink, John McMinn, Joe Pattie, Lucas Whittenton, Larry Garlington, Karen Wood, Jake Cartwright, Jackie McMinn, Colin Lockeby, Clay Parker, Brad Peacock

Comment: I am writing to express my strong opposition to the proposed rulemaking that seeks to establish a permanent moratorium on hog farms in the Buffalo River watershed. This moratorium represents a significant overreach that undermines the existing regulatory framework, disregards individual property rights, and threatens the long-standing tradition of agricultural production in our state. The Arkansas Department of Environmental Quality (ADEQ) already possesses the statutory authority and expertise to review, approve, or deny permits. The current regulatory framework ensures compliance with state and federal environmental laws thorough environmental assessments, public input, and enforceable permit conditions. ADEQ should be trusted to fulfill its responsibilities by addressing potential impacts on a case-by-case basis. Water quality is addressed through the existing permitting and enforcement mechanisms. A moratorium is both unnecessary and disproportionate given ADEQ's authority and capabilities. The proposed moratorium reaches well beyond protection and erodes an individuals' rights to farm on their own land. Agriculture is a foundational part of Arkansas' heritage and economy, especially in rural areas. Rather than implementing a moratorium that

could limit agricultural opportunities in the watershed, we encourage the Department to rely on its existing regulatory authority to evaluate permits based on scientific evidence and site-specific conditions. If we begin to selectively prohibit farming activities in certain areas without solid science and case-by-case review, it undermines the right to farm that has long been respected in Arkansas. I urge the Arkansas Pollution Control and Ecology Commission to reject this rulemaking and instead allow ADEQ to continue overseeing the permitting process under the current framework.

Response: APC&EC Rule 6 maintains the status quo with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed. The Division has no active NPDES permits for a CAFO in Arkansas, and the Division has no pending applications for an NPDES permit for a CAFO in Arkansas. The Division recognizes the differences of opinion with respect to NPDES permits for swine CAFOs in the Buffalo River Watershed.

Commenter Carey Robertson

Comment: Right to farm and use of your owned property is a fundamental area of equality in Arkansas. Don't let special Interest groups dictate land use. We have plenty of monitoring programs and expansive knowledge of farming practices in all kinds of situations. Moratoriums are inflexible and detrimental to innovation. At this point with wild hogs populations very large in Arkansas, that should be the priority issue to ensure safe and sound practices are in place.

Response: The Division acknowledges the comments.

Commenter Debbie Alexy

Comment: It is a blatant conflict of interest to move oversight of the Buffalo River to State agency with commercial interests supporting agriculture CAFOs. We have been there done that. Governor Hutchinson directed the Buffalo River to have permanent protection.

Response: The Division acknowledges the comments.

Commenter Dane Schumacher

Comment: What is the nature of DEQ's role as a consultant to the Division of Agriculture prior to issuance of new Rule Reg 6 permit?

Response: APC&EC Rule 6 is for the regulation of NPDES permits, and the Division has authority to issue NPDES permits pursuant to Rule 6. The Department of Agriculture does not have regulatory authority to issue NPDES permits.

Comment: What criteria will inform the DEQ State Director's decision to issue a new Rule 6 permit for a swine AFO that holds an active Liquid Animal Waste Management Systems permit as of the effective date of this rule?

Response: APC&EC Rule 6 is for the regulation of NPDES permits and provides the requirements for NPDES permit applications.

Comment: Will this criteria be applied before, during, or after possible discharge and/or pollutant enters waters of the United States?

Response: Arkansas Code Annotated § 8-4-217(b) prohibits the discharge of wastes into waters of the state without first having obtained a permit from the Division.

Comment: Will a Rule 5 No Discharge facility AFO that is issued a Rule 6 NPDES permit be deemed a CAFO under the Clean Water Act?

Response: CAFO is defined in 40 C.F.R. § 122.23.

Comment: Will DEQ receive notice of Reg 5 No Discharge Swine AFO's permitted to operate in the Buffalo River Watershed?

Response: APC&EC Regulation 5, "Liquid Animal Waste Management Systems," is outside the scope of this rulemaking. The authority over permits issued under APC&EC Regulation 5 was transferred to the Department of Agriculture.

Comment: Does the proposed new Rule 6.602(B) exempt small and medium size AFO's, which as defined in the Clean Water Act are not CAFOs?

Response: CAFO is defined in 40 C.F.R. § 122.23 as "an AFO that is defined as a Large CAFO or as a Medium CAFO..."

Comment: The mere use of the words "No Discharge" is in no way a safeguard against pollutants entering surface water or groundwater due to improper and faulty design of a liquid waste facility and storage area, faulty calculations of liquid waste amounts in storage ponds, and/or faulty nutrient management plans which allow for land applications in excess of nutrients, i.e., phosphorus, which in turn allows for waste disposal instead of appropriate agronomic utilization.

Response: APC&EC Rule 6 is for the regulation of NPDES permits, and the Division issues NPDES permits authorizing discharges into waters of the state. State "no-discharge" permits are outside the scope of this rulemaking.

Comment: I urge the Division of Environmental Quality to lean heavily on its role as a consultant in regard to the planning process, site-specific considerations, hydrogeology, surface and groundwater interactions, for liquid animal waste systems, especially swine AFOs, regardless of size, in karst terrain.

Response: This request is outside the scope of this rulemaking.

Comment: Resident taxpayers and concerned citizens do not need another round of litigious battles and/or a state sanctioned 6.2 million buyout agreement related to ill-placed, insufficient design, and woefully lacking liquid waste management protocols.

Response: The Division acknowledges the comment.

Commenter Brian Thompson for The Ozark Society

Comment: We ask that Regulation 6, reference guidance to the Agricultural Waste Management Field Handbook, as well as ANRCS Field Office Technical Guide, similar to the former Regulation 5. These sources provide sound guidance from agricultural experts in regard to siting and building CAFO. Please include these reference in the update Reg 6.

Response: The Division acknowledges the comment. The Division will take the comment regarding the Agricultural Waste Management Field Handbook and the ANRCS Field Office Technical Guide under consideration for the Division's internal processing procedures.

Comment: We agree with, and we sincerely appreciate retaining watershed specific rules prohibiting the issuance of industrial swine CAFO permits in the Buffalo National River watershed. This moratorium was suggested and promoted by Governor Asa Hutchinson after seven long years of controversy over a large industrial hog farm that was divisively permitted with inadequate public notification in perhaps the most environmentally sensitive location in the entire state. While we are not insensitive to property rights, property rights end at the fence line while contaminated runoff and ground water do not. We do not agree that one segment of one industry (agriculture) can be allowed to overwhelm and diminish the livelihoods of those in another industry (tourism) via unavoidable environmental degradation. There is a lot of room in Arkansas for raising swine, but large industrial swine CAFOs have no business in the ecologically sensitive karst geology of the Buffalo National river, the crown jewel of our great state.

Response: The Division acknowledges the comment.


Commenter Jim Petersen

Response: Q7-10 is defined in Rule 2 as “A flow volume equal to or less than the lowest mean discharge during 7 consecutive days of a year which, on the average, occurs once every 10 years.

Comment: How is the 30% loss determined? Let’s assume for illustration that the 7Q10 is 2 cubic feet per second. The 7Q10 is a statistical value of a streamflow that is expected to occur for 7 consecutive days once every 10 years on average. So it is a relatively rare occurrence. But let’s assume that the investigator is lucky enough to be at the discharge location at a time where the streamflow is 2 cubic feet per second. In that case the downstream streamflow would need to be less than 1.4 cubic feet per second for the segment to qualify as a losing stream segment. However, what if at the time of the permitting process, streamflow at the discharge location is consistently 5 to 10 cubic feet per second because the year has been relatively wet? What downstream streamflow value would be used?

Response: For a losing stream, the 30% loss is determined by measuring flow. Hypothetical scenarios are outside the scope of this rulemaking.

PREPARED BY:
ARKANSAS DEPARTMENT OF ENERGY AND
ENVIRONMENT, DIVISION OF ENVIRONMENTAL
QUALITY

By: 
Basil V. Hicks III
Attorney for Division of Environmental Quality
5301 Northshore Drive
North Little Rock, Arkansas 72118
(501) 682-0884
Basil.Hicks@arkansas.gov